Supreme Court, U.S.
FILED

05-173 JUL 28 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

FIRST FINANCIAL VENTURES, LLC, ET AL.,
Petitioners,

v.

BANK ONE, COLUMBUS, OHIO, NA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party's FRAP Rule 3(a) "Appeal as of Right" is sufficiently compromised, such that this Court should exercise its supervisory power to remedy same on certiorari, where a court of appeals makes a substantive finding that is contrary, debtors and oblivious to the plain text of the record on appeal; and either carelessly or stubbornly refuses to rectify the oversight, when same is brought to its attention on petition for rehearing, by denying the petition without comment.

PARTIES TO THE PROCEEDING
and
CORPORATE DISCLOSURE STATEMENT

Petitioners

Petitioners are Solo Ventures, LLC; Blue Chip Investments, LLC; and Redmill Holdings, LLC, limited liability companies respectively owned by Frederick Harris, M.D. and Carl Jackson, M.D., physicians practicing in Cleveland, Ohio. They were Defendants in the District Court and Appellants in the Sixth Circuit Court of Appeals.

Petitioners have no corporate affiliations.

Respondent

Respondent is Bank One, Columbus, Ohio, NA, formerly a corporation having publicly-traded stock, now acquired by J.P. Morgan Chase & Co., a corporation having publicly-traded stock. Respondent was Plaintiff in the District Court and Appellee in the Sixth Circuit Court of Appeals.

Petitioners are unaware of any publicly-held company owing ten percent (10%) or more of J.P. Morgan Chase & Co. stock.

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OPINIONS BELOW

Neither District Court nor Court of Appeals Opinion is reported.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was entered 3/22/05. The Court of Appeals then entered an order denying a timely Petition for Rehearing on 5/3/05.

Jurisdiction of this Court is invoked under 28 USC §1254(1); and the timeliness of Petitioners' filing is governed by Supreme Court Rules 13.1 and 13.3.

RELEVANT STATUTORY PROVISIONS

Supra and 28 USC §1291.

STATEMENT OF THE CASE

In 2001, Respondent brought this federal court action against Petitioners, et al. for declaratory and injunctive relief to remedy what it perceived to be a developing international pyramid scheme. Among other things, the action sought judicial imprimatur on Respondent's "freezing" Petitioners' bank accounts in response to that perception. Petitioners counterclaimed with several theories of liability, including Respondent's "negligent misrepresentation" in opening their accounts; and sought damages for the losses attending Respondent's freeze.

In summary judgment practice, Petitioners presented affidavit testimony that they suffered special compensatory damages - in varied fees, penalties, interest et al. expenses - in excess of $2,000,000.00 as a result of the freeze.

On 1/27/04, the District Court entered summary judgment in Petitioners' favor on their "negligent misrepresentation" claim and ordered the parties to brief the "measure of damages" issue. That briefing ensued and, although the Court identified the proper measure of damages, i.e., "the pecuniary losses caused by the other party's justifiable reliance upon the information," it nonetheless limited Petitioners' damages award to the "loss of use" of their funds, calculated on a "90-day T-Bill rate" basis:

> "...Defendant Blue Chip is entitled to $4,189.87, Defendant Solo Ventures is entitled to $9,926.55, and Defendant Redmill Holdings is entitled to $15,991.32 for the 101 day time period that the Bank One unilaterally froze the Defendants' accounts....
>
> ...Defendants were simply entitled to the value of the

> loss of the use of money which resulted from Morgan's unauthorized actions. To the extent the Defendants claim some further measure of damages is owing, the argument is without merit and is unsupported by the evidence of record."

From the entry of that judgment, Petitioners appealed to the U.S. Court of Appeals for the Sixth Circuit for review. There, the Court of Appeals affirmed with the following observation:

> "Finally, defendants' assertion that the district court erred by limiting their recovery to the 'loss of use' of their money is misplaced. Under Ohio law, the proper amount of damages for negligent misrepresentation is the 'pecuniary loss caused ...by their justifiable reliance upon the information.' (Authorities omitted) However, on appeal, defendants do not specify any other pecuniary damages that they incurred. Therefore, the district court's determination of the amount of damages was proper." (Emphasis added)

Petitioners then petitioned for rehearing, urging "the existence of clear record evidence of pecuniary loss substantially exceeding the 'loss of use' damages," to no avail. Without comment, the Court denied the petition on 5/3/05.

Therefrom, Petitioners now petition this Court for plenary review on certiorari.

ARGUMENT

Courts of appeals have jurisdiction of appeals from all final decisions of the federal district courts. 28 USC §1291.

And the only step necessary to perfect an appeal, "permitted by law as of right," is the filing of a notice of appeal with the district court. FRAP Rule 3(a)(1) and (2). Once such is accomplished, appellate jurisdiction's raison d'etre is that of "revising and correcting proceedings in a cause already instituted." *Marbury v. Madison*, 1 Cranch, 137, 175, 12 L.Ed. 60, 73 (1803).

Here, mundanely enough, Petitioners were dissatisfied with the district court judgment on the "quantum of damages" issue and, as a matter of right to appellate review, timely filed their notice of appeal to the U.S. Court of Appeals for the Sixth Circuit where, presumably, that judgment would be reviewed and, perhaps, revised and corrected.

In the Court of Appeals, however, the Court simply missed the elephant sitting in the corner of the room. In affirming the District Court's "loss of use" damages limitation, it found that Petitioners "[did] not specify any other pecuniary damages that they incurred" when, in fact, the Petitioners had specified over $2,000,000.00 in damages via "the varied fees, penalties, interest et al. expenses and losses detailed in Drs. Harris and Jackson's affidavits" filed in summary judgment practice below.

On occasion, appellate court oversight does occur, and such is no doubt the reason for FRAP Rule 40(a)(2):

> "The petitioner [for rehearing] must state with particularity each point of law or fact that petitioner believes the court has overlooked or misapprehended, and must argue in support of the petition...."

Here, however, despite Petitioners' own petition for rehearing, so particularizing and arguing, the Court of

Appeals chose to summarily deny the petition without comment.

From the foregoing, one can conclude only that the Court of Appeals either failed or refused to read the petition for rehearing or, worse, read but denied the petition despite its obvious merit. Either way, Petitioners' so-called "appeal as of right" was thereby compromised to become no right at all; and same constituted such a departure from the accepted and usual course of judicial proceedings that this Court should intervene and, exercising its supervisory power, remedy that departure here, on certiorari.

CONCLUSION

For these reasons, the Court should grant the Petition.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-3706

[Filed May 3, 2005]

BANK ONE, COLUMBUS, OHIO, N.A., Plaintiff - Appellee	)
v.	)
FIRST FINANCIAL VENTURES, LLC, et al., Defendant	)
FREDERICK D. HARRIS, CARL E. JACKSON, M.D. Defendants - Appellants	)

ORDER

BEFORE: BOGGS, Chief Judge; COOK, Circuit Judge; and BEER, District Judge*

* The Honorable Peter Beer, United States District Judge for the Eastern District of Louisiana, sitting by designation.

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk